INDEX

	Page
Opinions below	1
Jurisdiction	1
Questions presented	2
Statement	2
Argument	3
Conclusion	12

CITATIONS

Cases:

Bradshaw v. *Ashley*, 14 App. D. C. 485, affirmed 180 U. S. 59	9
Danforth v. *United States*, 308 U. S. 271	10, 11
District of Columbia v. *Cropley*, 23 App. D. C. 232	8
Greenleaf Lumber Co. v. *Garrison*, 237 U. S. 251	4, 5, 6
Kanakanui v. *United States*, 244 Fed. 923	11
Marine Ry. Co. v. *United States*, 257 U. S. 47	7
Martin v. *Waddell*, 16 Pet. 367	8
Monongahela Navigation Co. v. *United States*, 148 U. S. 312	6
Moody v. *Wickard*, 136 F. 2d 801, certiorari denied, 320 U. S. 775	11
Morris v. *United States*, 174 U. S. 196	7, 8, 9, 10, 11
Philadelphia Co. v. *Stimson*, 223 U. S. 605	4
Potomac Steamboat Co. v. *Upper Pot. S. Co.*, 109 U. S. 672	9
Shively v. *Bowlby*, 152 U. S. 1	8
Sioux Tribe v. *United States*, 316 U. S. 317	8
United States v. *Chicago, M., St. P. & P. R. Co.*, 312 U. S. 592	4, 5
United States v. *Commodore Park*, 324 U. S. 386	4, 5, 6-7
United States v. *Dern*, 289 U. S. 352	5, 7
United States v. *Jones*, 109 U. S. 513	11
United States v. *River Rouge Co.*, 269 U. S. 411	4
Utah Power & Light Co. v. *United States*, 243 U. S. 389	8

Statutes:

Act of January 12, 1809, 2 Stat. 511, sec. 3	9
Act of March 3, 1901, 31 Stat. 1424, sec. 1574, as amended by the Act of June 30, 1902, 32 Stat. 544, D. C. Code (1940) sec. 1-605	9
Act of April 27, 1912, 37 Stat. 93, sec. 4	10

In the Supreme Court of the United States

OCTOBER TERM, 1949

No. 715

JAMES MARTIN, LOTTIE MAY MARTIN, AND THE SMOOT SAND AND GRAVEL CORPORATION, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the District Court (R. 97) is reported under the name of *United States* v. *Groen* at 72 F. Supp. 713. The opinion of the Court of Appeals (R. 736-738) is reported at 177 F. 2d 733.

JURISDICTION

The judgment of the Court of Appeals was entered on October 31, 1949 (R. 739). By order of

the Chief Justice, dated January 25, 1950, the time for filing a petition for a writ of certiorari was extended to March 30, 1950 (R. 741). The petition for writ of certiorari was filed March 29, 1950. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the rights and title of riparian owners in the beds of the navigable streams of the District of Columbia are subordinate to the federal government's power to control navigation and commerce.

2. Whether title to the bed of the Anacostia River vested in the United States by cession from the State of Maryland.

3. Whether the trial court erred in determining the value of the petitioners' property.

STATEMENT

The facts of this case are stated in the Government's petition for a writ of certiorari to review the same judgment in No. 712, and hence will not be restated here. As appears there, the court below affirmed the judgment of the District Court holding that riparian owners of land on the Anacostia River have the right to fill and wharf into the river and that by exercising that right petitioners here have acquired title to land reclaimed by filling below the ordinary high-water mark of the river, the bed of which the lower courts recognized as owned by the

United States (R. 737-8; see Pet. in No. 712, pp. 8-9). The United States has filed a petition for a writ of certiorari, contending that the courts below erred in making this holding as to petitioners' right to fill and acquire the Government's title.

Petitioners here contend that the court below erred in placing a qualification upon their riparian rights and further that both lower courts erred in holding that the United States has title to the bed of the Anacostia River (subject only to petitioners' riparian rights) and in not holding that petitioners have title to the bed of the river to the channel thereof (as distinguished from a mere riparian right to acquire title to the bed by filling). Other grounds relate to alleged errors in valuing the rights which petitioners were held to have.

ARGUMENT

1. The court below held (R. 738) that "An owner of riparian land in Square East of 664 has a 'qualified right' to make fills and build wharves in the river." The qualification referred to arises out of the power of the federal government over the navigable waters of the United States in the regulation of commerce and navigation. Accordingly, the court below further held that "the fill and the wharf in suit may at any time be taken without compensation, in the interest of navigation, provided the taking is not arbitrary", and it directed that the judgment of the District Court be modified to so provide (R. 738).

For the reasons set out in the Government's petition for a writ of certiorari (No. 712), we believe the court below was in error in affirming the trial court's ruling as to the nature and extent of the riparian rights of petitioners here. However, if the trial court was to be affirmed in that respect, it was necessary to modify the judgment so as clearly to preserve the federal government's navigation powers. In so doing the court below relied upon decisions of this Court which clearly establish the correctness of this modification of the judgment. *United States* v. *Chicago, M., St. P. & P. R. Co.*, 312 U. S. 592, 595-599; *Greenleaf Lumber Co.* v. *Garrison*, 237 U. S. 251; see also *United States* v. *Commodore Park*, 324 U. S. 386, 390-391; *Philadelphia Co.* v. *Stimson*, 223 U. S. 605, 634-638.

With one exception, none of the cases cited by petitioners under their first heading (Pet. 11-12) deals with the federal government's navigation powers. In the one which does deal with this question (*United States* v. *River Rouge Co.*, 269 U. S. 411), this Court reaffirmed (p. 419) the principle that rights of riparian owners are subordinate to the "absolute power of Congress over the improvement of navigable rivers." Insofar as that case held that the power might not be arbitrarily exercised (269 U. S., at 419), it was followed by the court below since the judgment contains an express proviso that the exercise of the navigation power must not be arbitrary (see R. 738).

Cases such as most of those cited at Pet. 11-12 which do no more than determine the nature and extent of the rights of a riparian owner below the ordinary high-water mark of a navigable stream are immaterial. Even when such an owner has title to the bed of the stream between high and low-water mark, that title and the right to make fill or erect structures between high and low-water mark are subject to the "dominant power of the government to control and regulate navigable waters in the interest of commerce, without payment of compensation * * *." *United States* v. *Commodore Park,* 324 U. S. 386, 390; see also *United States* v. *Chicago, M., St. P. & P. R. Co.,* 312 U. S. 592, 596; *Greenleaf Lumber Co.* v. *Garrison,* 237 U. S. 251. That power is the same in the District of Columbia where, in addition to ownership of lands lying under water, the United States "has the plenary power to control navigation which was vested in the United States before the cession and which it exercises generally over navigable waters within the several states." *United States* v. *Dern,* 289 U. S. 352, 354. Accordingly, petitioners' right to make fills and build wharves in the river (even though it operates to give them title to the land filled) is necessarily subject to the navigation servitude.

Petitioners seek to avoid the effect of the foregoing decisions on the theory that since the Secretary of War had established harbor lines on the Anacostia River, their filling was done at the "invi-

tation" of the United States to improve navigation. Consequently, it is urged that petitioners acquired a vested right which cannot be impaired without compensation, and reliance is placed upon *Monongahela Navigat'n Co.* v. *United States,* 148 U. S. 312. A similar contention was made in *Greenleaf Lumber Co.* v. *Garrison,* 237 U. S. 251, and was flatly rejected. It was there held that all privileges granted in public waters are subject to the sovereign navigation power which is perpetual and not exhausted by one exercise. See 237 U. S., at 259-260, 261-262. The situation in the *Monongahela* case, where a public work was constructed at the specific instance of and under the authority of the State and Congress, was distinguished from the situation like the present where an owner in the exercise of his riparian rights builds to the harbor line and avails himself of the navigability of the river for his own interest. 237 U. S., at 264-266.

The alleged cloud (if such it can be called) which petitioners assert is cast not only upon their own title to the filled land but upon the title of all riparian owners on navigable streams (Pet. 10) is one which exists entirely apart from the judgment below. It inheres in the sovereign power over navigation and commerce. As this Court pointed out in *United States* v. *Commodore Park,* 324 U. S. 386, 390, that power is dominant over any "technical" legal title to a part of the navigable stream's

bed, and (p. 391) "riparian rights of access to navigable waters cannot, as against the government's power to control commerce, be bought and sold."

Accordingly, it is submitted that the judgment of the court below in this respect was eminently correct, is supported by numerous decisions of this Court, and presents no question for review.

2. The courts below correctly held that title to the bed of the Anacostia River vested in the United States by virtue of the cession from Maryland. *Morris* v. *United States,* 174 U. S. 196, 226-230, 246; *Marine Ry. Co.* v. *United States,* 257 U. S. 47, 63; *United States* v. *Dern,* 289 U. S. 352, 354; see the Government's Petition in No. 712, this Term, p. 11. Although the trial court relied upon these cases (R. 105-106), petitioners make no effort to distinguish them—they do not, in fact, even mention them. None of the cases cited (Pet. 15-16) bear even remotely upon a contrary conclusion.

Petitioners attempted in the trial court to prove that the Commissioners appointed by the President to help lay out the city of Washington had conveyed land below high-water mark ("to the channel" of the river) to their predecessors (see Pet. 6-7, par. 10). They contend (Pet. 16) that the trial court erred in holding that the Commissioners had no authority to convey land below high-water mark. This argument must be based upon accept-

ance of their erroneous assertion that title to the bed of the river did not pass to the United States from the State of Maryland by the cession of 1791. However, as we have shown, that title, which was formerly in the State of Maryland, passed from the State to the United States. Since the riparian proprietors at the time of cession had no title to the bed of the stream, title to land below high-water mark could not have passed from them under their conveyances to the trustees designated to receive this property pursuant to the plan for the establishment of the city. See Pet. 3-4; Government's Pet. in No. 712, pp. 5-6. The Commissioners, in turn, had authority to allot to petitioners' predecessors *only* such lands as had been conveyed in trust for the laying out of the city by the original proprietors of Carrollsburg (see R. 315-316). Consequently, the trial court correctly held that the Commissioners had no authority to convey title below ordinary high-water mark. *Morris* v. *United States*, 174 U. S. 196, 232-237; *Shively* v. *Bowlby*, 152 U. S. 1, 13, 48, 58; *Martin* v. *Waddell*, 16 Pet. 367, 411; *Sioux Tribe* v. *United States*, 316 U. S. 317, 326; *Utah Power & Light Co.* v. *United States*, 243 U. S. 389, 404-405; *District of Columbia* v. *Cropley*, 23 App. D. C. 232, 243-246.

Moreover, the trial court excluded on other grounds the evidence by which petitioners sought to show the alleged allotments to their predecessors of land below high-water mark. (See R. 131-147;

Pet. 6-7, par. 10).[1] To support the conveyances thus alleged to have been made, petitioners now make the further contention that the courts below should have presumed that the alleged allotment of land in the river bed "was valid and was supported by a *prior right in the original proprietor.*" (Pet. 16-17; italics supplied). Numerous cases involving the presumption of a lost grant are then cited, apparently for the purpose of establishing that the original proprietors in Carrollsburg, rather than the State of Maryland, had title to the bed of the river at the time of the cession. However, petitioners overlook the fact that none of the requisites for resort to the doctrine of a lost grant is present in this case. For example, there is no evidence whatsoever that land below high-water mark had been occupied prior to the cession. In fact, while petitioners seek to have the rulings of the courts below reviewed on the ground that they should have presumed a lost grant sometime prior to 1791 from the State of Maryland to the original

[1] These items of evidence (certain documents from the National Archives) were excluded on the ground that they were not competent evidence of title. This ruling not only presents no question for review by this Court, but was correct, since the true records of the division of lots by the Commissioners are those lodged in the office of the Surveyor of the District of Columbia. *Bradshaw* v. *Ashley*, 14 App. D. C. 485, 485-487, affirmed on other grounds, 180 U. S. 59; see also Act of January 12, 1809, 2 Stat. 511, 512, sec. 3; Act of March 3, 1901, 31 Stat. 1424, c. 854, sec. 1574, as amended by the Act of June 30, 1902, 32 Stat. 544, c. 1329, D.C. Code (1940) sec. 1-605; *Potomac Steamboat Co.* v. *Upper Pot. S. Co.*, 109 U. S. 672, 680-682, 698; *Morris* v. *United States*, 174 U. S. 196, 276. The latter records were admitted in evidence on behalf of petitioners (R. 184-185).

proprietors in Carrollsburg or their predecessors, the only basis for such a presumption is in certain alleged possession of land below high-water mark many years after title had passed to the United States (see Pet. 6, par. 9).

3. Petitioners' contention that the trial court should not have held a hearing to determine the value of the title found to exist in petitioners is plainly without merit. The Act of April 27, 1912, 37 Stat. 93, sec. 4, specifically requires that such valuation be made and reported to Congress. This requirement may not be disregarded by the court, nor may the parties waive or withhold the question of value from the action of the court. *Morris* v. *United States,* 174 U. S. 196, 289-291.

The alleged impairment in the value of petitioners' property said to arise from the so-called cloud created by the valuation decree (Pet. 17-18) is not a compensable or preventable injury. If Congress should decide to take the property at the value fixed, petitioners will, of course, be paid the just compensation guaranteed by the Fifth Amendment for a taking of their property. If, on the other hand, Congress should elect not to take petitioners' property, there will have been no "taking" in the constitutional sense and petitioners will be entitled to no compensation for any inconvenience arising from the fact that they were required to have the value of their property judicially determined. *Danforth* v. *United States,* 308 U. S. 271,

283-286; *Kanakanui* v. *United States,* 244 Fed. 923 (C.A. 9).

In the ordinary condemnation proceeding, the determination of the value of the property sought is "an offer subject to acceptance by the condemnor and thus gives to the user of the sovereign power of eminent domain an opportunity to determine whether the valuations leave the cost of completion within his resources. Condemnation is a means by which the sovereign may find out what any piece of property will cost." *Danforth* v. *United States,* 308 U. S. 271, 284; see also *United States* v. *Jones,* 109 U. S. 513, 519; *Moody* v. *Wickard,* 136 F. 2d 801, 803 (C.A. D.C.), certiorari denied, 320 U. S. 775. While Congress ordinarily delegates to an administrative official the authority to determine whether particular property is needed for a public use and whether or not to accept a condemnation award, the statute in the instant case merely provides, in a different manner, the means of arriving at the same result. Both under the 1912 Act, here involved, and the similar act involved in *Morris* v. *United States,* 174 U. S. 196, Congress, instead of delegating such authority to an administrative official, retained for itself the determination whether the property should be acquired at the price fixed by the court. The result is the same.

Although petitioners assert that errors were committed in the valuation proceeding (Pet. 7-8, 10, 18), no authorities are cited and no reasons are

given to show any basis for review by this Court of the rulings in which the Court of Appeals found no error (R. 738).

CONCLUSION

The questions raised by this petition were correctly decided by the courts below, there is no conflict of decisions shown, and review of those questions is not warranted. The issues presented are separate from, and need not be considered along with, those raised in the Government's petition. They are not of the character meriting decision by this Court. This petition should, therefore, be denied and the certiorari allowed in this case limited to the questions presented by the Government's petition in No. 712.

Respectfully submitted,

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